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IN THE SUPREME COURT
OF THE UNITED STATES

No. 93-911

COMMONWEALTH OF PENNSYLVANIA,
Petitioner
VS

PATRICK FOUNTAIN
and
DECARUS THOMAS,
Respondents

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# BRIEF OF PATRICK FOUNTAIN IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE PENNSYLVANIA SUPREME COURT FILED BY THE COMMONWEALTH OF PENNSYLVANIA

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## COUNTERSTATEMENT OF THE QUESTION PRESENTED FOR REVIEW

WHETHER POLICE OFFICERS MAY SEARCH A VEHICLE FOR WEAPONS AFTER STOPPING IT FOR A SUMMARY TRAFFIC OFFENSE, WHERE THERE IS NO INDICATION IN THE RECORD THAT THEY HAD A REASONABLE BELIEF THAT THE OCCUPANTS OF THE VEHICLE WERE ARMED AND DANGEROUS AND THAT WEAPONS WERE PRESENT IN THE VEHICLE WITHIN THE IMMEDIATE REACH OF THE PERSONS STOPPED.

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## COUNTER STATEMENT OF THE CASE

On June 15, 1991, at approximately 11:30 p.m., an Officer of the Darby Borough Police Department was patrolling in an unmarked police vehicle when he noticed a parked vehicle with three occupants drive away at a "high rate of speed". (R at 13; App. at 23a, 24a).). He started to follow this automobile and, at one point, it swerved around the gates of a railroad intersection warning device while those gates were down and signifying an oncoming train. (R at 13; App. at 24a). The Officer then activated his siren and overhead lights and stopped the vehicle. (R at 13). As the stop occurred, he noticed some "heavy movement" between the occupants although he admitted that he did not see any items pass

between them. (R at 33). The Officer testified that he stopped the vehicle solely because it went around the railroad gate and, had it not done this, he would have merely followed the car and would not have stopped it. (R at 21, 22).

After the car was stopped, the Officer approached it and asked the driver for his license and the vehicle's registration. The driver told him that he did not have his license and that the car was not his. (R at 14). At this point, the Officer "removed" the occupants from the automobile. (R at 14, 16). He did so in spite of the fact that he did not feel threatened by the persons in the vehicle and, in fact, he admitted at the Suppression Hearing that none of them threatened him or made any motions such as to hide a gun. (R 21-22). The

occupants of the vehicle, including Respondent Patrick Fountain, were then patted down and the car was searched. (R at 16). The pat-down revealed no contraband although one of the occupants had a "large sum of money." (R at 16). The search of the car, however, uncovered a gun which had been placed in a large pocket attached to the back of the driver's seat. (R at 17). Based upon these facts, the Honorable Charles C. Keeler of the Court of Common Pleas of Delaware County suppressed the gun found within the car and a Superior Court Panel, after hearing Oral Argument and considering the Briefs of the parties, affirmed the Order. The Commonwealth subsequently filed an Application for Reargument with the Superior Court but this Application was denied.

The Commonwealth then filed a timely Petition For Allowance of Appeal to the Pennsylvania Supreme Court which was also denied. It now files a Petition For Writ of Certiorari to the Pennsylvania Supreme Court to which this Brief responds.

## REASON WHY THE PETITION FOR WRIT OF CERTIORARI TO THE PENNSYLVANIA SUPREME COURT SHOULD BE DENIED

### I. THE APPELLATE COURTS OF THE COMMONWEALTH OF PENNSYLVANIA HAVE CORRECTLY CONSTRUED AND APPLIED THE PRECEPTS OF TERRY V. OHIO, 392 U.S. 1 (1968) AND MICHIGAN V. LONG, 463 U.S. 1032 (1983).

The Commonwealth argues that the United States Supreme Court case of Michigan v. Long, 463 U.S. 1032 (1983) permitted the Officer to search the vehicle since, according to the Commonwealth, the Officer herein reasonably believed that the occupants of the vehicle were dangerous and could gain immediate control of weapons.

This theory, however, is of no avail to it since the Record contains no facts from which the Officer could have reached such

conclusions.

Initially, he testified that he stopped the vehicle solely because it went around the railroad gate and, had the vehicle not done this, he would have merely followed the car and would not have stopped it. (R at 21, 22). Clearly, he did not feel threatened at this point. Moreover, after the stop occurred, there is nothing to indicate that the Officer was threatened in the least by the persons in the vehicle. Indeed, the Officer admitted at the Suppression Hearing that none of the people in the car threatened him or made any motion such as to hide a gun. (R at 21-22). Thus, there is no support in the Record for a reasonable belief that the occupants were dangerous.

In addition, there is no indication that the occupants had <u>immediate</u> access to weapons

once they had been taken from the car. First, the Record is devoid of evidence that the Officer had a reasonable belief that there was a weapon in the car and, moreover, while the car was searched, the occupants were detained and watched by three other members of the police force. Thus, they had no immediate access to any weapons within the car and, as such, this case is clearly distinguishable from Michigan v. Long, supra.

Nevertheless, the Commonwealth seeks to enhance the Record so as to create a factual basis for its conclusions. Specifically, it argues that the vehicle "fled from police" and attempted to "avoid police". (Petition for Certiorari at 12). This was not listed as a Finding of Fact by Judge Keeler and, even if it was, it would not have been supported by the Record. The testimony of the Police

Officer clearly showed that the incident occurred at night, in darkness, while he was driving an unmarked police car. (R at 12). Although he was in uniform, there is no indication that the uniform could be seen by any of the occupants and, moreover, the Officer testified that he did not have his hat on while he was driving. As such, it cannot be inferred from the Record that the occupants of the subject vehicle had any indication whatsoever that they were being followed by a police officer. In fact, the Officer never testified that the vehicle "fled" or "avoided police".

Likewise, the Commonwealth's statement that the Officer observed "furtive movements" among the occupants is an enlargement of the facts of Record. (Petition for Writ of Certiorari at i). The Officer testified at

the Suppression Hearing that he noticed some "heavy movement" among the passengers of the vehicle but he also admitted that he did not see anything pass between them. (R at 15). Based upon this evidence, the Hearing Court only made a Finding of Fact that the Officer "observed a great deal of movement between the occupants of the subject vehicle". (Trial Court Finding of Fact No. 3; App. at 24a). Nowhere in the Record, either in the Findings of Fact or in the testimony of the Officer, was the word "furtive" used to describe the movements of the occupants. As such, this Court should not accept it as a valid description of those movements.[1]

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[1]The Superior Court in its Opinion chided the Commonwealth for using the word "furtive" to describe the movement of the vehicle's occupants. See Superior Court Opinion at 5; App. at 8a ("we note that it was not until this Appeal that the movements were described as 'furtive'").

The Record herein supports only the factual conclusions that the vehicle in question took off at a high rate of speed from a parked position, in a high crime area and, a short time later, swerved around the gates at a railroad intersection at a time when those gates were down. Moreover, when stopped, the driver of the vehicle could produce neither a driver's license nor a registration for the vehicle. The Record does not support a conclusion that the police officers had a reasonable belief that the occupants of the vehicle were armed or dangerous and that they had immediate access to weapons in the vehicle.

Pursuant to Terry v. Ohio, supra, and Michigan v. Long, supra, the Hearing Court correctly suppressed the gun and the Appellate Courts of Pennsylvania correctly

affirmed this decision.

## CONCLUSION

Based upon the facts and law outlined supra, Respondent Patrick Fountain respectfully requests that the Court deny the Petition for Writ of Certiorari to the Pennsylvania Supreme Court which was filed by the Commonwealth of Pennsylvania.

Respectfully submitted:

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